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Supreme Court, U.S.
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No. 86-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

MONTGOMERY PUBLISHING COMPANY,

Petitioner

v.

CHARLES M. GANT,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether, in a defamation action based on an accurate newspaper report of an arrest, the Pennsylvania Supreme Court's affirmance without comment of a lower court decision placing the burden of proving truth on a media defendant can stand in light of *Philadelphia Newspapers, Inc. v. Hepps*, ____ U.S. ____, 106 S.Ct. 1558 (1986).

2. Whether a defamation plaintiff may meet his constitutional burden of proving falsity on the theory that a newspaper report of an arrest and relevant surrounding circumstances, complete and accurate in every material detail, gives rise to false inferences of guilt.

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1. The names of all parties to this proceeding in the Pennsylvania Supreme Court are contained in the caption of this case. Radnor Township, Pennsylvania, was named as an original defendant in this suit. The trial court entered nonsuit in the township's favor at the close of plaintiff's case. The Pennsylvania Superior Court affirmed that ruling, and it was not challenged in the Pennsylvania Supreme Court.

Pursuant to Sup. Ct. R. 28.1, Montgomery Publishing makes the following listing of parent, non-wholly owned subsidiary and affiliated companies:

Independent Publications, Inc.
Independence Communications, Inc.
Newsnet, Inc.
Montgomery Properties Co.
Telegraph Publishing Co.
Evergreen Printing & Publishing Co.
McLean Investment Co.
Valley Road Development Co.
McLean Financial Services Co.
Qualified Lead Systems, Inc.

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No. 86-____

IN THE

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October Term, 1986

MONTGOMERY PUBLISHING COMPANY,

Petitioner

v.

CHARLES M. GANT,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR CERTIORARI

Petitioner Montgomery Publishing Company respectfully prays that a writ of certiorari issue to review the order and judgment of the Pennsylvania Supreme Court entered in this matter on February 27, 1987.

OPINIONS BELOW

The *per curiam* affirmance of the Pennsylvania Supreme Court sought to be reviewed here is reported at Pa. , 521 A.2d 920 (1987), and appears at A-1 of the appendix to this petition.

The order of the Pennsylvania Superior Court reversing the judgment for the defendant publishers and remanding the case for a new trial is reported without opinion at 346 Pa. Super. 638, 499 A.2d 403 (1985). The court's order and accompanying unpublished memorandum opinion appear in the appendix at A-2.

The opinion of the Montgomery County Court of Common Pleas nonsuiting plaintiff is unreported, and appears in the appendix at A-11.

STATEMENT OF JURISDICTION

This is a petition for certiorari to the Supreme Court of Pennsylvania, the Commonwealth's highest court, seeking review of that court's *per curiam* order and judgment of February 27, 1987. This Court has jurisdiction under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. *Procedural History.*

This is a defamation action by Charles Gant ("Gant"), who claimed he was libeled by a newspaper article in *The Ambler (Pa.) Gazette*, published by Montgomery Publishing Company ("Montgomery Publishing"). The article accurately reported Gant's arrest for two in a series of virtually identical "flim-flam" crimes; Gant alleged that the article falsely implied his guilt of the two charges and his involvement in the similar crimes.

Trial commenced on January 31, 1980, in the Montgomery County Court of Common Pleas. On February 1, 1980, at the close of plaintiff's case, the trial court nonsuited Gant on the

ground that he had failed to disprove any statement in the challenged article, and that the article did not imply Gant's guilt of, or involvement in, any of the "flim-flam" crimes.

On Gant's appeal, the Pennsylvania Superior Court reversed. Relying on the Pennsylvania Supreme Court's decision in *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984), *rev'd*, U.S. , 106 S.Ct. 1558 (1986), the court held that Montgomery Publishing had the burden of proving the truth of any defamatory statement or inference in the article. Because at trial Gant had conceded the truth of only portions of the newspaper article, the court held that other portions of the article, along with unidentified inferences that the court drew from it, must be presumed false. It therefore remanded the case for a new trial.

On July 15, 1985, Montgomery Publishing filed a timely petition for allowance of appeal to the Pennsylvania Supreme Court. On April 21, 1986, this Court decided *Philadelphia Newspapers, Inc. v. Hepps*, U.S. , 106 S.Ct. 1558 (1986), in which it held that a libel plaintiff bears the burden of proving falsity in a case involving a media defendant and an issue of public interest.

On September 17, 1986, the Pennsylvania Supreme Court granted the petition for allowance of appeal. On February 27, 1987, in a one-line *per curiam* decision, the court affirmed without comment the Superior Court order, and judgment was entered on the affirmance.

B. *Statement Of The Facts*.

On October 9, 1975, Gant was arrested by Radnor Township Police at his home in Upper Dublin, Pennsylvania. Gant was charged with 1) theft by deception in connection with an incident that occurred May 22, 1975, in Strafford, Pa.; and 2) attempt to commit theft by deception in connection with an incident that occurred September 25, 1975, in Villanova, Pa.

The crimes with which Gant was charged were two in a series of virtually identical "flim-flam" crimes that had been committed throughout the Delaware Valley. In each instance, a culprit would pose as one "Frank Taylor" and would attempt to bilk businesses out of money by feigning telephone orders for

goods. Prior to Gant's arrest, a man named William Barclay Gordon ("Gordon"), Gant's cousin by marriage, had been arrested and charged with another of the "Frank Taylor" crimes.

On October 16, 1975, *The Ambler Gazette* published an article on Gant's arrest. The article described Gant's arrest and arraignment, and reported Gant's relationship to Gordon, although it said Gordon was Gant's "first cousin." The article also described the details of the "Frank Taylor" ruse, listed a number of times the ruse had been used, and reported police suspicions that Gant and Gordon were part of a "ring" that was perpetrating the flim-flam scheme.

The article was based on police statements and reports, and accurately reported those statements. Moreover, the article was factually accurate in all material respects.[2]

The charges against Gant were later dismissed. This suit followed.

At trial, Gant called seven witnesses, but only one — Gant himself — testified about the accuracy of the article. Under cross-examination Gant conceded that he had been arrested for the criminal offenses recited in the article on the dates specified in the article. He also admitted that the published details of his arraignment and preliminary hearing were correct, that the circumstances of his arrest were reported accurately, that he was a suspect with respect to other flim-flam crimes, and that another individual who was arrested in connection with similar "Frank Taylor" episodes was his cousin.

Gant presented no evidence that any portion of the article was untrue. He did testify that the charges against him had been dismissed, that he did not commit the crimes with which he was charged, and that he had never been involved in, or arrested for, the other "flim-flam" crimes.

C. *Manner In Which The Questions Sought To Be Reviewed Were Raised.*

In granting Montgomery Publishing's motion for nonsuit at the close of plaintiff's case, the Montgomery County Court of Common Pleas held that the First Amendment required Gant to

2. A transcription of the article appears in the appendix at A-17.

prove that the newspaper article concerning his arrest was false, that Gant failed to prove the falsity of any statement in the article, and that the article did not imply his guilt or involvement. Memorandum Opinion on Nonsuit, Appendix at A-13 to A-14.

The Superior Court reversed on the grounds that the First Amendment did not require Gant to prove falsity and that Pennsylvania could constitutionally require Montgomery Publishing to prove the article true. Because Gant did not concede the truth of every statement or supposed inference in the article, the Court held that nonsuit was not proper. Memorandum Opinion at 6-8, Appendix at A-7 to A-9.

In its petition for allowance of appeal to the Pennsylvania Supreme Court, Montgomery Publishing raised as constitutional error the Superior Court's allocation of the burden of proof, and the failure of Gant to meet that burden because the alleged inferences of guilt could not arise from the accurate article. Brief for Appellant 10-13, Appendix at A-19 to A-22. The Pennsylvania Supreme Court affirmed the Superior Court order without comment.

REASONS FOR GRANTING THE WRIT

The Pennsylvania Superior Court reversed and remanded this case on the basis of *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1986). It placed the burden of proving truth on the defendant, and presumed false both the article and all "inferences" arising from it. It therefore held that the defamatory statements and inferences Gant did not concede to be true could serve as the basis for a libel claim.

During the pendency of appeal to the Pennsylvania Supreme Court, this Court reversed the Pennsylvania *Hepps* decision. *Philadelphia Newspapers, Inc. v. Hepps*, U.S. , 106 S.Ct. 1558 (1986). It held that a defamation plaintiff bears the burden of proving falsity in a case involving a media defendant and a matter of public interest. *Id.* at , 106 S.Ct. at 1564.

Hepps' allocation of the burden of proof eliminated the principal basis for the Superior Court's reversal. Accordingly, this

case came before the Pennsylvania Supreme Court with constitutional error in the lower court decision. It also presented the Pennsylvania Supreme Court with its first opportunity to apply the newly enunciated *Hepps* rule.

Despite these factors, the Pennsylvania Supreme Court affirmed the lower court in a one-line, unexplained *per curiam* order. Two possible grounds, neither of which appears from the face of the decision, exist for this result: 1) the Pennsylvania Supreme Court endorsed the lower court's unconstitutional allocation of the burden of proof; or 2) the court treated the report of Gant's arrest as true, yet held that it gives rise to false "inferences" of guilt that support a defamation claim. Both grounds justify a grant of certiorari.

A. *The Pennsylvania Supreme Court's Unexplained Affirmance Circumvents The Mandate Of Hepps.*

If the decision below endorses the Superior Court's reasoning, it defies the constitutional rule announced by this Court in *Hepps*. Since *Hepps* reversed the Pennsylvania Supreme Court's placement of the burden of proof, and since the Superior Court relied on the now-discredited Pennsylvania rule, the silence below on this point is conspicuous. The Pennsylvania Supreme Court has failed to acknowledge its own error in *Hepps*, and has in effect asserted the constitutional correctness of the Superior Court's misallocation of the burden of proof.

When a state court decision can fairly be said to rest on a federal ground, and when an adequate and independent state ground is not articulated, this Court's announced practice is to presume that the federal ground controlled the decision. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Given the Superior Court's First Amendment rationale and the Pennsylvania Supreme Court's unexplained silence, this case can fairly be said to rest on a federal ground.

Certiorari and summary reversal is appropriate to correct the constitutional error that presumptively underlies the decision below.

B. *The Decision Below Unconstitutionally Permits A Defamation Plaintiff To Meet His Burden Of Proof On The Theory That An Accurate Report On A Matter Of Public Interest Gives Rise To "False Inferences."*

If the Pennsylvania Supreme Court correctly applied *Hepps*, then every statement in the Gant article must be taken as true, for Gant presented no evidence that any statement in the article was false. In that circumstance, a defamation claim could only exist if the accurate article gave rise to a "false inference" of guilt. Accordingly, the Pennsylvania Supreme Court has held that a plaintiff may meet his burden of proving falsity under *Hepps* on the theory that an accurate and complete report of an arrest — a matter of significant public interest — can give rise to "false inferences" of guilt.

The Court should examine the constitutional validity of this proposition. The First Amendment must impose a limit on the extent to which false inferences can be drawn from an accurate and complete factual account of a public issue. Speech about public issues is at the core of the First Amendment's guarantees. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964). To ensure that the public debate on these issues is "uninhibited, robust and wide open," *id.* at 270, this Court has repeatedly imposed constitutional limits on a state's ability to punish such speech, even when it is false.

In *Hepps*, *supra*, the Court placed the burden of proving the falsity of such speech on a defamation plaintiff. In *New York Times*, *supra*, the Court held that a public official could recover for defamation only when the defamatory speech was uttered with knowledge of its falsity or reckless disregard thereof. 376 U.S. at 279-80. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), the Court imposed a constitutional requirement of fault for any defamation action arising from speech on a public issue.

Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6 (1970), best illustrates the need for review of this case. There a newspaper, in an otherwise factually accurate report, characterized a developer's negotiating tactics in a zoning dispute as "blackmail." This Court held, as a matter of constitutional

law, that the word "blackmail" in that context could not imply actual commission of a crime. *Id.* at 13.

This case presents a corollary situation. The article describing Gant's arrest and suspected involvement in related crimes is true in every relevant detail. It omits no material facts, *see e.g., Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978); does not seek to draw a conclusion from ambiguous facts, *see, e.g., Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 448 A.2d 6 (1982); and does not employ highly charged or suggestive language to create a false impression. *See, e.g., Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. 588, 422 A.2d 625 (1980).

Instead, the article is an accurate, impartial and complete account of an arrest and the relevant surrounding circumstances. As the trial court recognized, it raises no "false inference" of guilt:

> [Gant] argues the article falsely implied that he was a member of the suspected ring. But it did not; it related the facts of the charges and the arrest with some history of other "Frank Taylor" thefts. No where is it stated that Gant *was* the thief, Frank Taylor; only the charge against him and the suspicions of the police are stated.

Trial court opinion at 4-5, A-14 (Emphasis in original).

To allow a defamation action here, based on "false inferences" of guilt, would inhibit the flow of information about public issues as surely as would a rule that made truth the test of free speech, *see New York Times*, 376 U.S. at 271, or that permitted literal defamatory inferences to be drawn from hyperbole. *See Bresler*, 398 U.S. at 13. "Just as the goal of a free and active press protects false statements of fact regarding public figures published without malice, so too must the law protect truthful facts that may give rise to false innuendo or inference." *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 477 A.2d 1005, 1012 (1984).

If a false inference of guilt can arise from an accurate and complete account of an arrest, the protection of *Hepps* will be

rendered meaningless. Without undertaking an independent investigation into the crime, a newspaper cannot know whether an arrested suspect is guilty. Yet as this case demonstrates, a libel plaintiff would be able to reach a jury, on the basis of a false "inference," whenever his arrest did not result in his conviction.

Perhaps because of its past focus on fault rather than falsity, *see Hepps*, U.S. at , 106 S.Ct. at 1563, the Court has never addressed this issue. Lower court authority generally supports a rule against defamation by innuendo when the reported facts are accurate and complete. *See Strada v. Connecticut Newspapers*, 193 Conn. 313, 477 A.2d 1005 (1984); *Schaefer v. Lynch*, 406 So.2d 185 (La. 1981); *Mihalik v. Duprey*, 11 Mass. App. 602, 417 N.E.2d 1238 (1981); *Lorrichio v. Evening News Assn.*, 13 Med. L. Rptr. 2016 (Mich Cir. Ct. 1986). *See also*, *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978) (when broadcast facts are true, actual malice cannot be based on their "innuendoes"); *Loeb v. New Times Communications Corp.*, 497 F. Supp. 85, 91 (S.D. N.Y. 1980) ("suggestive context" does not give rise to defamatory implications from accurately reported facts). Although some of these decisions turn in part on whether the plaintiff is a "public figure," the constitutional issue also arises when the challenged speech involves a matter of "public concern." *See Hepps*, U.S. at , 106 S.Ct. at 1563; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-56 (1985).

The issue affects the media's ability to report on such public matters, including crime. A newspaper or broadcast outlet should know whether it risks a libel suit each time it reports an arrest, or attempts to put an arrest in an accurate explanatory context. It should know whether, and to what extent, a court may review *editorial* decisions — the choice of a word, the breadth of a report, the matters emphasized — simply because it is concerned with "inferences" rather than the actual statements made.

In First Amendment matters, this Court has a duty to "make an independent examination of the record" to determine that "the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285. *See*

also Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984). In *Bresler*, *supra*, after holding that the decision below was based on a constitutionally impermissible definition of "malice," the Court went on to hold that use of the word "blackmail" could not constitutionally support a defamation action in that context.

That principle governs this case as well. The unexplained decision of the Pennsylvania Supreme Court can be fairly presumed to rest on a constitutionally impermissible allocation of the burden of proof, and should be reviewed and reversed on that basis. However, even if one passes that point, the decision impermissibly intrudes on the field of free speech. It permits a defamation plaintiff to circumvent *Hepps* by drawing "false inferences" from an accurate report on a matter of public interest to meet his constitutional burden of proof. This Court should discharge its duty under the First Amendment and review the significant constitutional question posed by this result.

CONCLUSION

For the foregoing reasons, the petition for certiorari to the Supreme Court of Pennsylvania should be granted.

Dated: May 28, 1987

Respectfully submitted,

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APPENDIX

[J-2 of 1987]

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

CHARLES M. GANT	:	No. 108 E. D. Appeal Dkt. 1986
	:	
	:	Appeal from Order of Superior
v.	:	Court entered June 14, 1985,
	:	at No. 154 Philadelphia, 1984,
	:	Affirming in Part and Revers-
MONTGOMERY PUBLISHING	:	ing in Part Order of Court of
COMPANY and RADNOR	:	Common Pleas of Montgomery
TOWNSHIP	:	County, Civil Division,
	:	entered May 16, 1984, at
	:	No. 76-16011
Appeal of Montgomery	:	
Publishing Company	:	346 Pa.Super. 638, 499 A.2d
	:	403 (1985)
	:	
	:	Argued: January 28, 1987

ORDER

FILED: February 27, 1987.

PER CURIAM:

Order affirmed.

Mr. Justice Larsen and Mr. Justice McDermott did not participate in the consideration or decision of this case.

CHARLES M. GANT, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
MONTGOMERY PUBLISHING COMPANY and RADNOR TOWNSHIP	:	No. 154 Philadelphia, 1984

Appeal from the Judgment entered in the Court of Common Pleas, Civil Division, of Montgomery County, No. 76-16011.

Before: ROWLEY, WATKINS and GEISZ, JJ.*

FILED: June 14, 1985

PER CURIAM:

Judgment entered in favor of Montgomery Publishing Company is reversed and remanded for a new trial.

Judgment entered in favor of Radnor Township is affirmed. Jurisdiction is relinquished.

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* Judge John A. Geisz, Senior Judge of the Court of Common Pleas of Philadelphia County, Pennsylvania, is sitting by designation.

CHARLES M. GANT, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
MONTGOMERY PUBLISHING COMPANY and RADNOR TOWNSHIP	:	No. 154 Philadelphia, 1984

Appeal from the Judgment entered in the Court of Common Pleas, Civil Division, of Montgomery County, No. 76-16011.

Before: ROWLEY, WATKINS and GEISZ, JJ.*

MEMORANDUM:

This is an appeal from a Judgment entered in favor of appellees following denial of appellant's motion to remove a compulsory nonsuit entered against him.

In an Opinion dated May 16, 1984, the trial court succinctly set forth the facts as follows:

> This is a defamation action arising out of an account of the arrest and arraignment of Charles M. Gant, plaintiff. The article appeared on October 16, 1975 in the Ambler Gazette, a newspaper published by defendant Montgomery Publishing Company. The arrest was for theft by deception. It was noted that similar "Flim-Flam" schemes had occurred in the area and that a ring of thieves was suspected. Radnor police supplied the newspaper with a description of the charges and facts surrounding the crimes. This is the basis of plaintiff's claim against Radnor Township.
>
> The article pictured plaintiff and was headlined 'North Hills Man Nabbed in Flim Flam Schemes'.
>
> * * * *

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* Judge John A. Geisz, Senior Judge of the Court of Common Pleas of Philadelphia County, Pennsylvania, is sitting by designation.

> Plaintiff started this action after he was cleared of the charges. One (charge) was dismissed at the preliminary hearing and the other nol prossed. Count I of the complaint alleges the article was false and defamatory. Count II alleges that the Radnor police violated the American Bar Association standards in releasing information of plaintiff's arrest.
>
> * * * *
>
> (During the defamation trial,) (a)t the close of plaintiff's case, both defendants moved for and were granted compulsory non-suits. Plaintiff filed motions to take off the nonsuits which were denied after argument. . . .

(Trial Court's Opinion at pages 1 and 3.)

In his motion, plaintiff/appellant asserted that issues of fact concerning the falsity of the article remained for the jury's consideration. This appeal is from the judgment entered after denial of appellant's motion to remove the nonsuits.

On appeal, appellant has presented three issues for our review: First, was appellant a public or private person as defined in libel law? Second, assuming that appellant was a private individual, was there negligence in the way that the article was written, which implied that appellant was a member of a (crime) ring and was committing other crimes, and was there negligence by the newspaper's reporter in not checking further than she did? Third, should a violation of the American Bar Association's Standards relating to fair trial and free press give rise to a tort action against the municipality (Radnor Township)?

Because issues one and three can be quickly disposed of, they will be discussed first. Appellant failed to include the first issue in his motion to remove the nonsuits, and therefore has failed to properly preserve that issue for our review as prescribed in Pa.R.C.P. 1038.[1] Thus, upon appeal, he has waived his first

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1. At the time of trial, Pa.R.C.P. 1038 was still in effect. It has since been subsumed into Pa.R.C.P. 227.1, which has retained the same meaning. See the Explanatory Comment-1983 to Pa.R.C.P. 227.1.

issue pursuant to the mandate of Pa.R.A.P. 302(A).[2]

Appellant's third argument alleges that Radnor Township police, in disseminating information concerning his arrest, violated the American Bar Association Standards relating to fair trial and free press, and that such a violation gives rise to a tort action against the Township. We have reviewed the record and accorded due consideration to this argument. We find that Judge Brown's Opinion of May 16, 1984, properly disposes of this issue. Therefore, we affirm the judgment entered in favor of Radnor Township.

We now turn to Appellant's second argument: Was there negligence in the way that the article was written or reported such that it implied that appellant was a member of a crime ring and was committing other crimes?

We note that in reviewing the propriety of the granting of the compulsory nonsuit, we need not ultimately determine whether the publishing company was actually negligent, but need only determine whether the plaintiff/appellant's evidence was sufficient to present a question for the jury on which a verdict for the plaintiff could have been based. *Commonwealth Trust Co. v. Carnegie-Illinois Steel Co.*, 353 Pa. 150, 44 A.2d 594 (1945); *McNett v. Briggs*, 217 Pa.Super. 322, 272 A.2d 202 (1970). The foundation for this principle lies in the concept that when the trial court is presented with a choice between two reasonable inferences, the case must be submitted to the jury. *Kelly v. Doran*, 312 Pa.Super. 286, 458 A.2d 962 (1983); *Paul v. Hess Bros., Inc.*, 226 Pa.Super. 92, 312 A.2d 65 (1973).

In making that determination, we must view the evidence in the light most favorable to the plaintiff/appellant. *Francioni v. Gibsonia Truck Corp.*, 472 Pa. 362, 372 A.2d 736 (1977); *West Penn Power Co. v. Bethlehem Steel Corp.*, 236 Pa.Super. 413, 348 A.2d 144 (1975). We may affirm the trial court's entry of the compulsory nonsuit only if the case before the trial court is clear, *McKenzie v. Cost Bros., Inc.*, 487 Pa. 303, 409 A.2d 362 (1979); *West Penn Power Co. v. Bethlehem Steel Corp.*, 236 Pa.Super.

2. Pa.R.A.P. 302(a) provides that "(i)ssues not raised in the lower court are waived and cannot be raised for the first time on appeal."

413, 348 A.2d 144 (1975), if the facts and circumstances have as the only conclusion the absence of liability, *McKenzie v. Cost Bros., Inc., supra*, and where there is no doubt as to the inferences to be drawn from the evidence.

West Penn Power Co. v. Bethlehem Steel Corp., supra.

In a defamation action,

> it is the trial court's function to determine, in the first instance, whether the communication complained of is capable of a defamatory meaning. *Rutt v. Bethlehem's Globe Published* [sic] *Co.*, ____ Pa. Super. ____ , 484 A.2d 72 (1984); *Rybas v. Wapner*, 311 Pa. Super. 50, 457 A.2d 108 (1983). If the court determines that it is capable of defamatory meaning it then becomes the jury's function to decide whether the communication was so understood by its recipients. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 442, 273 A.2d 899, 904 (1971); *Braig v. Field Communications*, 310 Pa. Super. 569, 574, n.2, 456 A.2d 1366, 1369, n.2 (1983), *cert. den.* 104 S.Ct. 2341 (1984); *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 482, 448 A.2d 6, 10 (1982).
>
> A statement is defamatory if it tends to harm an individual's reputation so as to lower him in the estimation of the community or deter third persons from associating or dealing with him. *Corabi v. Curtis Publishing Co.*, at 442, 273 A.2d at 904; *Rybas v. Wapner*, at 54, 457 A.2d at 110.
>
> * * * *
>
> In determining whether a newspaper article, for example, is defamatory, the trial court must decide whether it can reasonably be construed to have the libelous meaning ascribed to it by the complaining party. *Corabi v. Curtis Publishing Co., supra; Rutt v. Bethlehem's Globe Publishing Co., supra.* As such, the work must be construed in its entirety. *Rutt v. Bethlehem's Globe Publishing Co., supra; Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. 588, 422 A.2d 625 (1980). Thus, the plaintiff may not lift

words out of their context; defamatory references in one paragraph may be negated or explained elsewhere. Furthermore, the trial judge must ascertain the impression that the article creates in a reader's mind.

'The test is the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate. The words must be given by judges and juries the same significance that other people are likely to attribute to them.'

Corabi v. Curtis Publishing Co., at 447, 273 A.2d at 907, quoting *Boyer v. Pitt Publishing Co.*, 324 Pa. 154, 157, 188 A. 203, 204 (1936)

Zartman v. Lehigh County Humane Society, ____ Pa.Super. ____ , 482 A.2d 266 (1984).

In the instant case, the trial judge found that "(t)he (Ambler Gazette) article could be understood as defamatory" with respect to appellant. We agree. Because this conclusion has not been raised as an issue, we need not discuss it further.

Once having agreed with this initial, mandatory[3] determination, however, we depart from the trial court's analysis. Our Supreme Court has had occasion to address the subject. In *Hepps v. Philadelphia Newspapers, Inc.*, ____ Pa. ____ , 485 A.2d 374, 387 (1984), Chief Justice Nix wrote, "in a libel suit brought by a private individual for compensatory damages resulting from the defamatory material, the *presumption of falsity* remains and the defendant has the option of proving truth as an absolute defense to the action." (Emphasis added.) This holding clarifies the Pennsylvania defamation statute which, under the heading of "Burden of defendant" states that "(b) (i)n an action for defamation, the defendant has the burden of proving when the issue is properly raised: (1) The truth of the defamatory communication."[4]

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3. See *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa.Super. 588, 422 A.2d 625 (1980).

4. 42 Pa.Cons.Stat. §8343.

The *Hepps* decision has effectively overruled that portion of *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa.Super. 475, 488 A.2d 6 (1982), wherein our Court stated that the plaintiff must prove falsity in a defamation action. Because the *Hepps* decision was so recent, neither the trial court nor the litigants were able to consider it at the time of trial.

With *Hepps v. Philadelphia Newspapers, Inc.*, in mind, we have reviewed the record to determine whether the plaintiff/appellant's evidence was sufficient to present a question for the jury on which a verdict for the plaintiff could have possibly been based. Appellee Montgomery Publishing Company argues that regardless of the evidence presented by plaintiff/appellant at trial, truth, as an absolute defense, was established during the cross-examination of appellant, thereby precluding the need for appellee to present its case and raise the defense itself.

Having reviewed the record, we find that during cross-examination, appellant, upon questioning by defense counsel, did admit to the truth of *selected* statements from the article (R.R. 46a-50a.) Some of these selected statements were quoted verbatim to appellant; others were paraphrased. We also note that the trial court included *some* statements from the article in its Opinion of May 16, 1984. (pp. 2-3)

However, there is a considerable amount of newsprint upon which defense counsel did not cross-examine appellant, and which the trial court did not include for consideration in its opinion. Importantly, these omitted parts of the article are particularly relevant to appellant's allegation that the article imputed his involvement in other crimes or some sort of scheme or crime ring. Appellant, during cross-examination, did not admit to the truth of any of the statements in the following passage from the article:

> After hanging up the phone, Taylor would then tell the employee the boss said to pay him a certain amount of money, which the worker did.

> The Radnor officers said Gant is suspected of being the bilker who entered John's Bar and Grille, Lancaster Avenue, Strafford in May and offered to sell the bartender $150 worth of meat.
>
> He asked to talk to the owner, feigned a conversation and after disconnecting the call said the owner agreed to buy the meat.
>
> The bartender, William Oswald, handed the suspect $150 and the flim-flam artist signed a receipt "$150 paid. Owes Frank Taylor $62," said police.
>
> THE SAME RUSE was used again, allegedly by Gant, September 25 at the Campus Corner in Villanova.
>
> This time, he tried to sell $100 worth of ham to Pat Clifford, Ambler, an employee.
>
> After seeming to get the owner's okay by phone, the suspect asked Clifford for $100. Clifford refused and the suspect left.

The statements in the above passage may be capable of a defamatory meaning in this case, and were not admitted to as being true by appellant.

Even if the appellant had admitted to the truth of every individual statement in the article, he was neither asked, nor volunteered any responses as to the truth of reasonable inferences which could be drawn from the article. Our Court has previously stated that beyond the literal meaning of each sentence "the issue is whether a finding of falsity may be based on a false inference drawn from true facts . . . true facts that in context imply a falsehood are, in an action for defamation, not true." *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa.Super. 475, 491, 448 A.2d 6, 14-15 (1982).[5]

Appellant did not complete the requirements of appellee's affirmative defense during the presentation of his case: he neither admitted to the truth of all of the statements in the article

5. This portion of *Dunlap, supra*, was not overruled by *Hepps, supra*.

nor admitted to the truth of all reasonable inferences which could be drawn from the article. In light of *Hepps*, the *Ambler Gazette's* potentially defamatory statements carry a presumption of falsity to which no defense had yet been established when the compulsory nonsuit was granted. The record discloses no reason to have taken the case from the jury.

Therefore, the judgment entered in favor of Montgomery Publishing Company is reversed and that action is remanded for a new trial.

Judgment entered in favor of Radnor Township is affirmed.

Jurisdiction is relinquished.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION — LAW

CHARLES M. GANT	:	NO. 76-16011
	:	
v.	:	
	:	
MONTGOMERY PUBLISHING COMPANY and RADNOR TOWNSHIP	:	

OPINION

BROWN, J. MAY 16, 1984

This is a defamation action arising out of an account of the arrest and arraignment of Charles M. Gant, plaintiff. The article appeared on October 16, 1975 in the Ambler Gazette, a newspaper published by defendant Montgomery Publishing Company. The arrest was for theft by deception. It was noted that similar "Flim-Flam" schemes had occurred in the area and that a ring of thieves was suspected. Radnor police supplied the newspaper with a description of the charges and the facts surrounding the crimes. This is the basis of Plaintiff's claim against Radnor Township.

The article pictured plaintiff and was headlined "North Hills Man Nabbed in Flim-Flam Schemes." The article then read as follows:

> Radnor police may have cracked the ring of Frank Taylors who have been flim-flamming their way across Delaware Valley with Monday's arrest of a North Hills man.
>
> Charles Gant, 161 Jackson Ave., was arrested Monday afternoon at his home by Radnor and Upper Dublin police.
>
> Officers John Kelly and R.E. Adams, Radnor, said Gant has been charged with theft by deception in a May 22 incident in Strafford and criminal attempt to commit theft by deception in Villanova last month.

Interestingly, Gant is the first cousin of William Barclay Gordon, 37, Walnut Street, Penlyn, arrested last January on similar flim-flam charges while posing as Frank Taylor.

Both men are suspected as being part of a ring which has bilked money from dozens of small businesses, often by passing themselves off as delivery men.

In each case, a man calling himself Frank Taylor entered a business, asked an employee to call the boss and pretended to have a conversation with him.

After hanging up the phone, Taylor would then tell the employee the boss said to pay him a certain amount of money, which the worker did.

* * * *

Gant was arraigned before District Justice Todd Miller Monday evening and released on $1000 bail for each count.

His preliminary hearing is scheduled for 4:15 p.m. Oct. 20 before Miller.

* * * *

Gant's cousin, Gordon, is in Bucks County Prison, said Radnor police, on detainers from Los Angeles for failure to appear at a trial in which he was charged with grand theft and from Montgomery and Delaware Counties.

In this area, the Frank Taylor ruse was first used successfully last Dec. 8 at Eiselen's Pastry Shoppe, Erdenheim.

Since then there have been several incidents in Upper Dublin, Lower Gwynedd and Ambler, the most recent of which was Oct. 4 at Lenny Bee's, 85 E. Butler Ave.

Plaintiff started this action after he was cleared of the charges. One was dismissed at the preliminary hearing and the other nol prossed. Count I of the complaint alleges the article was false and defamatory. Count II alleges that the Radnor police

violated the American Bar Association standards in releasing information of plaintiff's arrest.

Trial commenced on January 31 and February 1, 1980. At the close of plaintiff's case both defendants moved for and were granted compulsory non-suits. Plaintiff filed motions to take off the non-suits which were denied after argument by Order dated December 23, 1983. Plaintiff's appeal necessitates this opinion.

The threshold question is whether the article is defamatory, *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super Ct. 588, 422 A.2d 625 (1980). A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred or contempt, or ridicule or injure him in his business, *Dunlap v. Philadelphia Newspapers Inc.*, 301 Pa. Super Ct. 475, 488 A.2d 6 (1982). The article could be understood as defamatory. Plaintiff's picture appeared under the headline "North Hills Man Nabbed in Flim-Flam Schemes."

But in addition to being defamatory the publication must be proven false before being actionable. Plaintiff bears the burden of proving its falsity, *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 94 S. Ct. 2997, 41 L. Ed.2d 789 (1974); *Dunlap v. Philadelphia Newspapers Inc.*, *supra*. If the publication was substantially accurate, the claim fails. *Williams v. WCAU-TV*, 555 F. Supp. 198 (E.D. Pa. 1983).

Plaintiffs called three witnesses to testify to the damage to his reputation. Another witness testified that plaintiff was not the person who committed a similar crime at her place of employment in the King of Prussia Plaza. Mrs. Gant testified to the effect the article had on her husband. Plaintiff also called the reporter who wrote the article. She testified as to how she was informed of the arrest and the charges and how she became aware of the suspected ring. On direct examination plaintiff gave testimony concerning his personal history and stated that while William Barclay Gordon is his cousin, they are not first cousins as the article stated. Plaintiff also gave details of the arrest and the disposition of the charges. Finally, he told of the effect the article had on his reputation. On cross-examination he admitted the report was factually accurate, except that Gordon is not his first cousin.

Plaintiff cites *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. Ct. 475, 448 A.2d 6 (1982), for the proposition that the literal accuracy of separate statements in a newspaper article do not render the communication true where the implication of the article as a whole is false. He argues the article falsely implied that he was a member of the suspected ring. But it did not; it related the facts of the charges and the arrest with some history of other "Frank Taylor" thefts. No where is it stated that Gant *was* the thief, Frank Taylor; only the charge against him and the suspicions of the police are stated. "[T]ruth is a complete and absolute defense in a civil action for libel", *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 450, 273 A.2d 899, 908 (1971).

As to defendant Radnor Township, plaintiff's position is that the Supreme Court adopted the American Bar Association standards, concerning pre-trial information which should not be released to the press by the police, in *Commonwealth v. Pierce*, 451 Pa. 190, 303 A.2d 209 (1973).[1] He alleges Radnor police violated (c) "any inflammatory statements as to the merits of the case, or the character of the accused", by disclosing details of the charges and how the crimes were committed, and claims he has a cause of action in tort for this violation. Assuming arguendo the adoption of the standards, agency on the part of the police to speak for Radnor Township and the violation alleged,[2] plaintiff

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1. The court stated,

"In accordance with these views, we rule that in this Commonwealth policemen and members of the staffs of the office of District Attorneys shall not release to the news media: (a) the existence or contents of any statement or confession given by the accused, or his refusal to give a statement or to take tests; (b) prior criminal records of the accused including arrests and convictions; (c) any inflammatory statements as to the merits of the case, or the character of the accused; (d) the possibility of a plea of guilty; (e) nor shall the authorities deliberately pose the accused for photographs at or near the scene of the crime, or in photographs which connect him with the scene of the crime. See generally ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, §§ 1.1 and 2.1 (Approved Draft 1968)."

2. Describing the charges and explaining how the crimes were committed hardly amounts to inflammatory statements as to the merits of the case as plaintiff alleges. In fact § 2.1 (Second Edition) authorizes such disclosures.

still has not made out a case against Radnor Township. Nowhere in *Pierce* has the court created a cause of action in tort as a remedy for violation of the standards. The standards concern criminal trials and the remedy for a violation is a new trial as ordered in *Pierce*. Both non-suits were proper.

By the Court:

s/ Lawrence A. Brown,

J.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CHARLES M. GANT	:	108 E.D. Appeal Dkt. 1986
	:	
v.	:	
	:	
MONTGOMERY PUBLISHING COMPANY and RADNOR TOWNSHIP	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the SUPERIOR COURT, be, and the same is hereby affirmed.

BY THE COURT:

s/Marlene F. Lachman

Marlene F. Lachman, Esq.
Prothonotary

Dated: February 27, 1987

North Hills Man Nabbed in Flim-Flam Schemes

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Officers John Kelly and R.E. Adams, Radnor, said Gant has been charged with theft by deception in a May 22 incident in Strafford and criminal attempt to commit theft by deception in Villanova last month.

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This time, he tried to sell $100 worth of ham to Pat Clifford, Ambler, an employee.

After seeming to get the owner's okay by phone, the suspect asked Clifford for $100. Clifford refused and the suspect left.

Gant was arraigned before District Justice Todd Miller Monday evening and released on $1000 bail for each count.

His preliminary hearing is scheduled for 4:15 p.m. Oct. 20 before Miller.

Assisting Radnor police in the arrest were Upper Dublin detectives and Officers Frank Tholey and Robert Smith.

Gant's cousin, Gordon, is in Bucks County prison, said Radnor police, on detainers from Los Angeles for failure to appear at a trial in which he was charged with grand theft and from Montgomery and Delaware Counties.

In this area, the Frank Taylor ruse was first used successfully last Dec. 8 at Eiselen's Pastry Shoppe, Erdenheim.

Since then there have been several incidents in Upper Dublin, Lower Gwynedd and Ambler, the most recent of which was Oct. 4 at Lenny Bee's, 85 E. Butler Ave.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 108 E.D. Appeal Docket 1986

MONTGOMERY PUBLISHING COMPANY,
Petitioner,

v.

CHARLES H. GANT,
Respondent.

BRIEF FOR APPELLANT

On Petition for Allowance of Appeal
From the Judgment Entered June 14, 1985,
By the Superior Court of Pennsylvania
At No. 154 Philadelphia, 1984

Of Counsel:

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Attorneys for Petitioner
Montgomery Publishing
Company

VI. ARGUMENT

A. *Every Statement In The Article Was Either Conceded To Be True Or, As The Courts Below Recognized, Not Contradicted, And Therefore Gant Is Constitutionally Barred Under* Hepps *From Predicating A Defamation Action On Those Statements.*

At trial, Gant conceded the truth of most of the material statements in the *Gazette's* article. Under cross-examination, Gant agreed that the article accurately reported 1) the circumstances of his arrest and arraignment; 2) the existence of the series of "Frank Taylor" crimes; 3) the police's suspicions that he was involved in those other crimes; and 4) that William Gordon, arrested for another of the "Frank Taylor" crimes, was his cousin.

Moreover, Gant produced no evidence at trial that any statement in the article was false. Under these circumstances, Gant failed to satisfy his constitutionally imposed burden of proving falsity, and he therefore cannot predicate a defamation claim on those statements.

The Superior Court's decision to the contrary is error. That court placed the burden of proving the truth of the article on Montgomery Publishing; because Gant did not concede the truth of every statement in the article, the court held that those statements must be presumed false, and were therefore actionable. The court relied for its holding on *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984).

However, *Hepps* has been reversed by the United States Supreme Court, and is no longer good law. *Philadelphia Newspapers v. Hepps*, ____. U.S. ____ , 106 S.Ct. 1558 (1986).

There the Supreme Court held, as a matter of constitutional law, that "the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." ____ U.S. ____, 106 S.Ct. at 1564. The Court therefore placed the burden of proving falsity on the libel plaintiff.

The plaintiff in *Hepps* was a liquor distributor who was accused in a series of newspaper articles of having links to organized crime. As the Supreme Court recognized, the case

involved a "private figure" libel plaintiff, a media defendant and speech on a matter of public concern. *See* ____ U.S. at ____, 106 S.Ct. at 1563.

In such circumstances, the Court held, the interests protected by the First Amendment required the plaintiff to bear the burden of proving allegedly defamatory statements false:

> [T]he need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: *placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result*. Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, *we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant*. To do otherwise could "only result in a deterrence of speech which the Constitution makes free."

____ U.S. at ____, 106 S.Ct. at 1564 (citations omitted; emphasis supplied).

Here, *Hepps* clearly applies, even if Gant is a private figure.[2] Montgomery is a media defendant and the subject of the newspaper article is a matter of public concern. "Public" speech is not limited to political expression or comment on public affairs; it "must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967), *quoting Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *see Connick v. Meyers*, 461 U.S. 138, 147-48 (1983). Gant's arrest and his suspected involvement in a string of very similar

2. The Superior Court did not address Gant's public or private figure status, although that status is relevant to the degree of fault Gant must show for recovery. *See* section C. of this argument, *infra*. However, this portion of the argument will assume Gant's private figure status, since under *Hepps* it does not affect the result.

thefts, like Hepps' alleged ties to organized crime, fall into this category. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private figure lawyer accused of ties to John Birch Society).

Accordingly, the Superior Court committed error in presuming the article or its implications false and requiring Montgomery to prove their truth. That presumption is constitutionally impermissible; under *Hepps*, Gant has the burden of proving falsity.

As both courts below recognized, Gant failed at trial to produce any evidence that any statement in the *Gazette* article was false. Even the Superior Court reversed solely because Gant did not concede the truth of every statement in the article or of the inferences it engendered. *See* Superior Court opinion at 7-8. Accordingly, since Gant produced no evidence of falsity, he did not carry his constitutional burden of proof.

Gant's failure to contradict any statement in the Gazette's article precludes a defamation claim based on those statements. The Superior Court's contrary holding must be reversed.